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International Law Commission

Sixty-ninth session (first part)

Provisional summary record of the 3367th meeting
Held at the Palais des Nations, Geneva, on Friday, 2 June 2017, at 10 a.m.

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/705)

Report of the Drafting Committee (A/CN.4/L.894)

The Chairman invited the Chairman of the Drafting Committee to introduce the third report of the Drafting Committee, on the topic "Protection of the atmosphere", as contained in document A.CN/4/L.894.

Mr. Rajput (Chairman of the Drafting Committee) said that the report contained three preambular paragraphs and one draft guideline. The Drafting Committee had devoted four meetings — on 18, 19, 22 and 29 May 2017 — to its consideration of the draft guidelines referred to it by the Commission.

He wished to pay tribute to the Special Rapporteur, Mr. Murase, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the members of the Drafting Committee for their valuable contributions to a successful outcome and to the secretariat for its invaluable assistance.

At its 3359th meeting on 17 May 2017, the Commission had decided to refer draft guidelines 9, 10, 11 and 12, as contained in the Special Rapporteur's fourth report (A/CN.4/705), to the Drafting Committee, taking into account the debate in the Commission. The Special Rapporteur, when summing up the debate, had suggested reformulations of the proposed draft guidelines, taking into account the various comments made in the plenary, in particular to streamline the draft guidelines into a single guideline.

To that end, the Drafting Committee had before it a working paper containing the proposals made by the Special Rapporteur in his summing up. After an initial round of comments concerning the structure of the draft guidelines, the Special Rapporteur had prepared a revised working paper, which had constituted the basis of discussions in the Drafting Committee. That proposal had sought to restructure the draft guidelines further, by presenting, in one paragraph, aspects of the interrelationship between the rules of international law relating to protection of the atmosphere and other relevant rules of international law, particularly the rules of international trade and investment law, the law of the sea and international human rights law. It had grounded the interrelationship in the Vienna Convention on the Law of Treaties and in customary international law. The proposal had contained a separate paragraph relating to the interpretation and application of relevant rules of international human rights law with respect to persons belonging to vulnerable groups. Additionally, the proposal had reflected, in three separate preambular paragraphs, other elements concerning the close interaction between the atmosphere and the oceans, the situation of small island and low-lying States, and the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere.

Following discussions, the Drafting Committee had decided to split the first paragraph proposed by the Special Rapporteur in his revised working paper into two separate paragraphs, one dealing with existing rules and one dealing with the development of new rules. It had also revised the language of the second proposed paragraph, which had become the third paragraph of draft guideline 9.

Draft guideline 9 contained three paragraphs which sought to reflect the relationship between rules of international law concerning the atmosphere and other relevant rules of international law. Paragraphs 1 and 2 were general in nature, while paragraph 3 emphasized the protection of groups particularly vulnerable to atmospheric pollution and atmospheric degradation. As the current topic dealt with atmospheric pollution and atmospheric degradation caused by humans, activities in other fields of the law had a bearing on the atmosphere and its protection. Draft guideline 9 highlighted the various techniques in international law for addressing tensions between legal rules and principles, whether they related to a matter of interpretation or a matter of conflict. In preparing the formulation, the Drafting Committee had drawn on the Commission's study on the fragmentation of international law.

Paragraph 1 of draft guideline 9 provided that "the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts". The paragraph dealt with identification of the relevant rules as well as their interpretation and application. It was formulated in the passive voice in recognition of the fact that the process of identification, interpretation and application involved not only States but also international organizations, as appropriate.

The reference to "including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law" reflected the concern within the Drafting Committee to capture, on the one hand, the practical importance of those three areas to the atmosphere, and, on the other, the risk of overlooking other fields of law, which might be equally relevant. The phrase "including *inter alia*" represented the agreement in the Drafting Committee reflecting that "without prejudice" categorization and indicated that the list of relevant fields of law was not exhaustive.

The phrase "should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations" drew upon the Commission's conclusions in the fragmentation study. The paragraph applied to rules arising from treaty obligations and other sources of international law. That was indicated by the term "identified", even though some members of the Drafting Committee had questioned the need for such a specification.

The first sentence also made specific reference to principles of "harmonization and systemic integration", which had been accorded particular attention in the Commission's conclusions in the fragmentation study. As noted in the conclusions, "harmonization" entailed that when several norms bore on a single issue they should, to the extent possible, be interpreted so as give rise to a single set of compatible obligations. Moreover, systemic integration denoted that, whatever their subject matter, treaties were a creation of the international legal system and should be interpreted against the background of other international rules and principles.

The phrase "and with the view to avoiding conflicts" signalled that avoiding conflicts was among the principal purposes of the paragraph. While some members had suggested placing that phrase at the beginning, the Drafting Committee had decided to retain it at the end of the sentence, as that better reflected the nuance that the guidelines had more than one purpose.

The second sentence of paragraph 1 sought to locate the paragraph within the relevant rules set forth in the 1969 Vienna Convention on the Law of Treaties, including articles 30 and 31 (3) (c), and the principles and rules of customary international law. The phrase "principles and rules of customary international law" covered such principles and rules of customary international law as were relevant to the identification, interpretation and application of relevant rules.

In contrast to paragraph 1, paragraph 2 dealt with the situation where States wished to develop new rules. It provided that "States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner." The paragraph signalled a general desire to encourage States, when engaged in negotiations for the creation of new rules, to take into account the systemic relationships that existed between rules of international law relating to the atmosphere and rules in other legal fields.

Paragraph 3 highlighted the plight of those who found themselves in vulnerable situations because of atmospheric pollution and atmospheric degradation. It had been reformulated to make direct reference to atmospheric pollution and atmospheric degradation. It provided that "when applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous people, people of

the least developed countries and people of small island and low-lying States affected by sea level rise."

The reference to paragraphs 1 and 2 captured both the aspects of identification, interpretation and application, on the one hand, and development, on the other. The phrase "special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation" underlined the broad scope of the consideration to be given to the situation of vulnerable groups, covering both aspects of the topic, namely atmospheric pollution and atmospheric degradation. It had been considered appropriate to omit a reference in the text to "human rights" or even to "rights" or "legally protected interest". The second sentence of paragraph 3 gave examples of groups that might be in vulnerable situations, although the phrase "may include, *inter alia*" indicated that those examples were not necessarily exhaustive. The commentary would develop the examples mentioned in the sentence, as well as others, including local communities, migrants, women, children, persons with disabilities, as inspired by the preamble of the Paris Agreement, and also older persons.

Some members had registered reservations not only with respect to the various guidelines initially proposed by the Special Rapporteur, but also regarding the reduction of the issues into a single guideline. Some members had expressed concern regarding the scope of the draft guideline, in particular the absence of any reference to purpose, for example protecting the atmosphere or achieving sustainable development.

The title of the draft guideline was "Interrelationship among relevant rules" to indicate the relationship between rules of international law relating to the atmosphere, on the one hand, and various other rules of international law, on the other.

Turning to the three preambular paragraphs, he said that preambular paragraph 3 *bis* would be placed after the third preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It acknowledged the physical relationship that existed between the atmosphere and the oceans. The Drafting Committee had not made any changes to the text proposed by the Special Rapporteur. Given that the relationship between the atmosphere and the oceans was cyclical and varied, the preambular paragraph simply noted as a factual matter the close interaction between the atmosphere and the oceans.

Preambular paragraph 4 *bis* would be placed after the fourth preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It provided: "*Also aware*, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea level rise." That preambular paragraph was linked to the persons and groups in vulnerable situations referred to in draft guideline 9 (3). The words "in particular" were intended to acknowledge specific areas without necessarily foreclosing the list of potentially affected areas. The original proposal by the Special Rapporteur had included references to delimitation, potential loss of statehood and environmental migration. The Drafting Committee had decided to offer a shorter and more streamlined text with the phrase "due to sea level rise". Such an approach had been considered appropriate, since the draft guidelines did not provide any guidance on how those three complex questions should be addressed in relation to the topic in a preambular paragraph.

The sixth preambular paragraph would be placed after the fifth preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It read: "*Noting* that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account". The Drafting Committee had not made any changes to the text proposed by the Special Rapporteur. It would be recalled that the Commission had addressed considerations of intra- and inter-generational equity in draft guideline 6 on equitable and reasonable utilization of the atmosphere.

In conclusion, he expressed the hope that the Commission would be in a position to provisionally adopt the three preambular paragraphs and draft guideline 9, as presented.

The Chairman invited the Commission to adopt the three preambular paragraphs and draft guideline 9, as provisionally adopted by the Drafting Committee.

Preambular paragraphs

The preambular paragraphs were adopted.

Draft guideline 9

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Mr. Vázquez-Bermúdez said that, in the English version, the reference should be to "indigenous peoples" rather than "people", in line with the United Nations Declaration on the Rights of Indigenous Peoples, among other documents.

Mr. Park said that, although he had no objection to adopting paragraph 3, it seemed that the Drafting Committee, of which he had been a member, had missed an inconsistency between draft guideline 9 (3) and preambular paragraph 4 *bis*. The former referred to "people of small island and low-lying States affected by sea-level rise" whereas the latter mentioned "low-lying coastal areas and small island developing States", which was quite different. The issue was both a formal and a substantive one. During the discussions in the Drafting Committee, the choice of terminology for preambular paragraph 4 *bis* had been considered at length, based on a proposal by Ms. Oral, but less attention had been paid to draft guideline 9 (3). Perhaps it would be possible to resolve the issue during "*toilettage*" or in the plenary.

Mr. Murase (Special Rapporteur) said that, as preambular paragraph 4 *bis* referred to questions related to sea level rise and draft guideline 9 (3) referred to human rights, albeit not explicitly, the context in each case was different. Considerable time had been spent in the Drafting Committee discussing which terms to use in preambular paragraph 4 *bis*, and in the end it had been decided to opt for constructive ambiguity in the form of "low-lying coastal areas". He was not in favour of reopening the debate on the matter at the current stage; he could, of course, reflect the points raised in the Drafting Committee in the commentaries that he would be drafting before the second part of the session.

Mr. Nguyen said that he shared the concern raised by Mr. Park about the difference between the terms "low-lying coastal areas" and "low-lying States", and was not convinced by the Special Rapporteur's reasoning in relation to the different contexts. Small islands, low-lying States and low-lying coastal areas of coastal States were facing the same consequences of migration, food shortage and land loss caused by sea level rise. Those were human rights issues. He therefore proposed that draft guideline 9 (3) should be amended to refer to "low-lying coastal areas", which covered both low-lying States and low-lying coastal areas of States.

Ms. Oral said that she agreed with Mr. Park about the inconsistent use of terminology. The terminology in draft guideline 9 (3) did not reflect the standard language used, including that of the Paris Agreement itself, on which the Drafting Committee had drawn. As currently drafted, draft guideline 9 (3) could be somewhat confusing, and should perhaps be amended during "*toilettage*" to ensure consistency.

Mr. Tladi said that the points raised by Mr. Park, Ms. Oral and Mr. Nguyen, with which he tended to agree, could not simply be resolved during the "*toilettage*" process.

Mr. Rajput (Chairman of the Drafting Committee) said that, before turning its attention to the preambular paragraphs, the Drafting Committee had not had the occasion to consider draft guideline 9 (3) at length, and had not revisited it at a later stage. He agreed that the matter went beyond mere "*toilettage*". The term "low-lying coastal areas" had been introduced deliberately in the preamble by consensus of the Drafting Committee because it was quite broad. The Special Rapporteur might therefore consider reproducing the language used in the preamble in draft guideline 9 (3). The end of the last sentence of paragraph 3 would then read: "indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea level rise".

Mr. Murase (Special Rapporteur) said that he supported the proposal made by Mr. Rajput.

The Chairman, noting that the phrase "due to sea level rise" was used in preambular paragraph 4 *bis*, while "affected by sea level rise" was used in draft guideline 9 (3), asked whether the terminology should perhaps be harmonized and, if so, which expression should be used.

Mr. Tladi said that there was a difference in context, inasmuch as preambular paragraph 4 *bis* referred to the special situation of States themselves, while draft guideline 9 (3) concerned the impact of sea level rise on people. He therefore saw no need to change the language in question.

Paragraph 3, as amended, was adopted.

The Chairman said he took it that the Commission wished to adopt the report of the Drafting Committee on the protection of the atmosphere, as a whole, as contained in document A/CN.4/L.894.

It was so decided.

The Chairman said that it was his understanding that the Special Rapporteur would prepare the commentaries, for inclusion in the Commission's report on its sixty-ninth session.

Organization of the work of the session (agenda item 1) (*continued*)

The Chairman drew attention to the proposed programme of work for the first two weeks of the second part of the Commission's sixty-ninth session, to be held from 3 July to 4 August 2017. If he heard no objection, he would take it that the Commission wished to adopt the programme, as proposed.

It was so decided.

After the usual exchange of courtesies, **the Chairman** declared the first part of the sixty-ninth session closed.

The meeting rose at 10.55 a.m.